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The Political Value of Knowledge and the Elite Schools' Curricula: To Ignore or Not to Ignore Marxism?

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INTRODUCTION

This article focuses on the content of elite law schools' curricula. Like all such debates,¹ this one also reflects the author's political and social concerns, which at this time are questioning the impact such curricula have on the graduates' abilities to deliberate "upon the full range of issues which might appear directly or indirectly on a less impoverished [contemporary] political agenda."²

Elite law schools, which are usually associated with elite universities, are expected to offer liberal legal education. Elite law schools are the fountain of legal scholarship. They are also the place where many of this nation's leaders acquire both legal knowledge about truth and ideologies³ — lenses through which they see the world, form their beliefs and then act accordingly.

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1. See, e.g., Geraint Parry, *Constructive and Reconstructive Political Education*, 25 OXFORD REV. EDUC. 24 (1999).

2. *Id.* at 35.

3. "Ideologies are elusive entities [that] must be identified indirectly." JON ELSTER, *MAKING SENSE OF MARX* 459 (Cambridge Univ. Press 1985). Another concept used to describe them is the most recent but less popular one of Balkin's "cultural software." J.M. BALKIN, *CULTURAL SOFTWARE: A THEORY OF IDEOLOGY* (Yale Univ. Press 1998). Ideologies represent shared beliefs about society and how it should work. Ideologies affect one's imagination, and accordingly, motivate her actions. To a large extent people acquire ideologies in schools and then in universities and in graduate schools. The formative role of higher education upon one's beliefs does not need too much explanation, as it seems to be well-known and well-accepted. See, e.g., David Brooks, *Age of Political Segregation*, N.Y. TIMES, June 29, 2004, at A27 ("college-educated voters are more ideological.").

This author understands the goals of liberal education to translate John Stuart Mill's principle of "market of ideas"⁴ into a content-rich curriculum. As Mill wrote, "the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it."⁵

To the contrary, this article argues, currently elite law schools have abandoned Mill's principle. They favor a more limited version, one that excludes uncomfortable theories, such as Marxism.

Omitting Marx's writings, this article argues, is not an innocuous curricular reduction. If theories are subjective constructs — "academic elites make theories in their own image,"⁶ then a curriculum stripped of a theory that emphasizes a different perspective about legal phenomena risks being perceived as a mere exercise in cultural hegemony.⁷

Our society is still based on classes that are identified economically, and our law still has to govern the behavior of people with different economic constraints. For example, Marx's writings, as argued here, make it easier to articulate why a rational choice for those who rely on public services is to favor progressive taxation, and for those who rely on private services, tax cuts.⁸

4. JOHN STUART MILL, ON LIBERTY (Harlan Davidson 1947) (1869). See also *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (expounding the marketplace of ideas theory, which stands for individual choice of which ideas and beliefs deserve expression based on their availability on the free market of ideas).

5. MILL, *supra* note 4, at 24.

6. Mary Louise Pratt, *Ideology and Speech Act Theory*, 7 *POETICS TODAY* 59, 59 (1986).

7. For the original meaning of "hegemony" — related to the strategy employed by dominant classes to rule without employing force, see ANTONIO GRAMSCI, *SELECTIONS FROM THE PRISON NOTEBOOKS* (1971). For its current widespread use, see Raymond Williams, *Marxist Cultural Theory*, in *RETHINKING POPULAR CULTURE* 412-15 (Chandra Mukerji & Michael Schudson eds., Univ. of Cal. Press 1991). About the role institutions of higher education play, see, e.g., Williams, *supra*, at 414 ("The educational institutions are usually the main agencies of the transmission of an effective dominant culture") and Lawrence S. Lifschultz, *Could Karl Marx Teach Economics in the United States?*, in *HOW HARVARD RULES: REASON IN THE SERVICE OF EMPIRE* 280 (John Trumbour ed., 1989) ("[there is] work about the economics of education, and how education in the United States has historically reproduced class relationship in society.").

8. For a brief discussion, see Marc Linder, *Eisenhower-Era Marxist-Confiscatory Taxation: Requiem for the Rhetoric of Rate Reduction for the Rich*, 70 *TUL. L. REV.* 905, 906-07 (1996) ("Successive Congresses since the first Reagan administration have so thoroughly subverted the legitimacy of high and progressive income taxes for the rich that an advocate runs the risk of facing the same derision that the economist and comptroller-general of the *ancien regime*, Turgot, icily reserved for the draft of such a tax more than two centuries ago: 'Il faut exécuter l'auteur, et non le projet.'") (citations omitted), cited in Dana Neacșu, *CLS Stands for Critical Legal Studies. If Anyone Remembers*, 8 *J.L. & POL'Y* 415, 450 (2000). For an insightful account of the attempt by President Bush II to rid the poor of

I. WHY THIS ARTICLE ARGUES FOR ELITE LEGAL CURRICULA THAT MIRRORS JOHN STUART MILL'S MARKET OF IDEAS

Despite their innocuous name, theories go beyond theoretical contemplation.⁹ As the German philosopher Hans-Georg Gadamer pointed out, theories are a form of participation.¹⁰ According to Gadamer, the primitive Greek meaning of *theōria* (theory)¹¹ was that of "participation in the delegation sent to a festival for the sake of honoring the gods."¹²

Interestingly for this article's argument is Gadamer's ideal objective theory. It needs to be briefly addressed because of those that may be inclined to argue that legal theories are objective, and that they can be "neutral in regard to all the interests at stake in any practical application of it, and consequently capable of any application one might wish to make."¹³ Such an attempt will be dismissed by using Gadamer's more persuasive argument that theories may also be constructs that depend on one's cultural and social presuppositions.¹⁴

Ideologies may be easily viewed as meta-knowledge inculcated by Gadamer's tradition — preconceptions — as well as one's perception of authority,¹⁵ because they represent mere unfiltered beliefs about society and how it works.¹⁶ Legal theories on the other hand, analyze, and make value judgments about social norms — legal norms. Nevertheless they are the

their old-age government-administered entitlement program, known as Social Security, see Anna Quindlen, *No Principle, Just Interest*, NEWSWEEK, Feb. 7, 2005, at 68.

9. OXFORD ENGLISH DICTIONARY 902 (2d ed) ("Mental view, contemplation"). Aside from Foucault, whose theory of knowledge is briefly analyzed below, other contemporary thinkers have focused on the social role of knowledge. Jurgen Habermas, for example, showed how knowledge functions in the reproduction of social life, and how knowledge responds to various types of interest. JURGEN HABERMAS, *KNOWLEDGE AND HUMAN INTERESTS* (Jeremy Shapiro trans., Beacon Press 1972) ("For knowledge is neither a mere instrument of an organism's adaptation to a changing environment nor the act of a pure rational being removed from the context of life in contemplation." *Id.* at 197.).

10. INGRID SCHEIBLER, *GADAMER: BETWEEN HEIDEGGER AND HABERMAS* ix (Rowman & Littlefield 2000).

11. HANS GEORG GADAMER, *THE IDEA OF THE GOOD IN PLATONIC-ARISTOTELIAN PHILOSOPHY* 61 (Christopher Smith trans., Yale Univ. Press 1986).

12. See SCHEIBLER, *supra* note 10, at vii.

13. GADAMER, *supra* note 11, at 161.

14. Gadamer builds his theory on MARTIN HEIDEGGER, *BEING AND TIME* (Joan Stambough trans., State Univ. of N.Y. 1996) (1927) (showing the influence upon one's knowledge of the existing cultural and social presuppositions that are embodied and expressed for example, in language and customs) See also SCHEIBLER, *supra* note 10, at 30 n.43.

15. For example, it is common knowledge that with the exception of the Civil War and the Depression political realignment, people share the same political views and political party membership as their parents. See, e.g., ANGUS CAMPBELL ET AL., *THE AMERICAN VOTER* (Wiley 1960), and WARREN E. MILLER & J. MERRILL SHANKS, *THE NEW AMERICAN VOTER* (Harvard Univ. Press 1996).

16. See generally JON ELSTER, *supra* note 3, at 459-76.

result of an act of authorship, and mirror their author, who has her own set of values and beliefs. Thus, legal theories may be regarded as beliefs filtered through one's system of values, but nevertheless subjective. Additionally, they impact one's behavior because they either endorse or prescribe human behavior. Furthermore, like ideology, they eventually become part of one's tradition and preconceptions.

In our representative democracy, despite the advanced level of institutionalization, agents still play a very important role.¹⁷ For example, the United States Supreme Court's decisions — thus the institution's rulings — are highly determined by its agents — the nine Supreme Court Justices.¹⁸ Thus, what constitutes those agents' baggage of knowledge and beliefs is highly relevant.

A more persuasive theory in support of liberal legal education is Michel Foucault's theory of knowledge. For Michel Foucault all knowledge is biased, and the only way to cure that bias is by engaging in a market of ideas type of education which includes even conflicting legal theories.

Foucault acknowledged that theories — the "truth" — are linked with the system of power which produces and sustains them.¹⁹ Aside from political theories, legal theories are the closest to each society's system of power as their very object of study is — ultimately — power in one form or another. Law, in its different forms and shapes is the product of all branches of government.²⁰ Hence, it seems difficult to regard any legal theory as only "[a] scheme or system of ideas or statements held as an explanation or account of a group of facts or phenomena."²¹ Legal theories by their very subject are normative: legal norms endorse a type of human behavior — the good one as opposed to the bad one.

Very useful for this article's argument about inclusive legal curricula is Foucault's persuasive answer to the question: "whom does discourse serve?"²² He acknowledged that behind any public discourse ("the posing of the question"²³) there is socio-political power. By allowing only certain questions to be posed Foucault explained that there is an implied

17. POST-MODERN LAW ENLIGHTENMENT, REVOLUTION AND THE DEATH OF MAN 27 (Anthony Carty ed., Edinburgh Univ. Press 1990).

18. For a general discussion on this topic, see LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (CQ Press 1998).

19. MICHEL FOUCAULT, TRUTH AND POWER IN POWER/KNOWLEDGE (Colin Gordon ed., Pantheon Books 1980).

20. See, e.g., WILLIAM BURNHAM, INTRODUCTION TO THE LAW AND LEGAL SYSTEM OF THE UNITED STATES 40, 197 (3d ed., West 2002) and generally DANA NEACȘU INTRODUCTION TO AMERICAN LAW AND LEGAL RESEARCH (Transnational 2005) (to be published).

21. 17 OXFORD ENGLISH DICTIONARY 902 (2d ed).

22. FOUCAULT, *supra* note 19, at 115.

23. *Id.* at 116.

assumption by the receiver of the theories that they answer the important questions,²⁴ and that the very absence of other questions implies that both they and their answers are irrelevant.²⁵ Bringing this abstract discussion to the purpose of this article, by its very omission Marxism is being presented as an irrelevant theory that describes irrelevant issues. The message is that the socio-economical identities are no longer important in our society.

Foucault plainly explained that the entire public discourse at one moment in time represents that society's "régime of truth." While his description of the régime of truth may be arguable, he magisterially summarized its function. According to Foucault, the régime of truth, which means the institutionalized truth, or institutionalized public discourse — institutionalized knowledge — installs and legitimizes a political regime. For him, régime of truth was "not merely ideological or superstructural; it was a condition of the formation and development of capitalism."²⁶

Legal theories do promote well identifiable interests and desired outcomes. *De minimis*, when the legal academia stands by a legal theory it sanctions a certain type of social and legal reality. And whenever it chooses to do so, it does it at the expense of an alternative one.

A recent analysis of Foucault's Power/Knowledge also illustrated the impact Foucault's thesis on power had on mainstream understanding of law.²⁷ Foucault identified the "myriad ways that organizational and institutional mechanisms create the conditions for the flourishing of certain truths at the expense of others."²⁸ In other words, any theory that is part of the public discourse brings with it "power-knowledge"²⁹ which involves the subjugation of alternatives knowledges and identities.

The truth or knowledge does not come out from nowhere. It is the product of the work of what Foucault called "intellectuals." They come in two types: the universal and the specific.³⁰ The universal intellectual is one who views herself as "the consciousness/conscious of us all."³¹ Foucault dismissed the very existence of such intellectuals. He believed that all intellectuals were "specific"³² by virtue of being in the service of the "State

24. *Id.*

25. Foucault articulated this issue as an attack to "a certain kind of Marxism" which ignored the value of psychiatric internment and penal institutions to the functioning of the wheels of power. *Id.*

26. *Id.* at 133 (emphasis added).

27. BRENDON EDGEWORTH, LAW, MODERNITY, POSTMODERNITY: LEGAL CHANGE IN THE CONTRACTING STATE 34-35, 207-23 (2003).

28. *Id.* at 216.

29. FOUCAULT, *supra* note 19.

30. *Id.* at 116-33.

31. *Id.* at 126.

32. *Id.* at 127.

or Capital” as technicians, magistrates, or teachers.³³ Intellectuals are thus in the service of legitimizing a system of power. Truth is further defined as only an “ensemble of rules” that establish what is true.³⁴ Then, according to Foucault, the main issue becomes that of the battle to promote a certain type of truth for economic and political reasons.³⁵

The battle for the elite law schools curricula matters because elite law schools produce legal knowledge, legitimize the ideologies behind that knowledge, and school tomorrow’s leaders. First, let’s talk about how elite law schools create legal scholarship and implicitly legitimize the ideologies behind that knowledge. They do so through law review articles published in their own legal journals.³⁶

Of course, every law school has a few law journals, but it is common knowledge that the odds for a law review article to be persuasive and cause any (legal) stir are significantly better if it is published in an elite law school’s main journal.³⁷ For example, for the last seven years, the five most cited journals are those from Harvard, Yale, Columbia, Stanford, and Michigan.³⁸

Additionally, those schools’ main journals publish mostly articles authored by their own faculty³⁹ or faculty from other similarly positioned schools. Those authors, of course are generally elite law schools products

33. *Id.* The issue of the tenured faculty members will not be brought up here as the question of their potential or perceived support of the establishment and the reasons behind it go beyond the scope of this article.

34. *Id.*

35. FOUCAULT, *supra* note 19.

36. For a general discussion about the intimate connection between legal scholarship and law review articles see Dana Neacșu, *Legal Scholarship and Digital Publishing: Has Anything Changed in the Way We Do Research?* 21 LEGAL REF. SERV. Q. 105 (2002).

37. For a detailed explanation of the difference between law reviews and specialty journals, see Michael L. Closen & Robert J. Dzielak, *The History and Influence of the Law Review Institution*, 30 AKRON L. REV. 15, 16 (1996). It should also be noted that — in a slightly different version — this article had been submitted to and rejected by all elite law schools’ journals (except Columbia Law Review which had stopped accepting submissions at the time this article was sent out). The only journal that did not acknowledge receiving it (either by mail or online) was Harvard Law Review.

38. See MOST-CITED LEGAL PERIODICALS: U.S. AND SELECTED NON-U.S., available at <http://law.wlu.edu/library/research/lawrevs/mostcited.asp>.

	Name of Journals	1996-2003	1995-2002
1	Harvard Law Review	6682	6557
2	Yale Law Journal	5582	5716
3	Columbia Law Review	4742	5057
4	Stanford Law Review	4262	4400
5	Michigan Law Review	4065	4173

39. Of course, for the sake of argument, even if there were a handful of elite law school professors who did not or would not publish in their schools’ law reviews, that had not and would not diminish their scholarship authority.

as well.⁴⁰ Thus, what professors from elite schools teach and publish (usually in their own law reviews) becomes the authority within legal academia. Accordingly, it influences not only their own students but also law professors — and through them their students — from lower tier schools. To the extent that what those journals publish becomes legal scholarship the beliefs of those authors are accordingly legitimized.

Finally, the content of legal curricula matters also because it shapes students' legal knowledge and beliefs. As shown below, schools, through their curricula, shape both our public debate and our system of republican government,⁴¹ as more and more voters are college graduates.⁴² In 1960, "only 22 percent of voters had been to college; now more than 52 percent have."⁴³ If that is true for voters, it only seems logical that more leaders as well, have been to college.

Of course, many of those college-educated attend state and city schools. But as the absolute number of undergraduates has steadily increased, from 935,140 in 1980-01 to 1,244,171 in 2000-01,⁴⁴ similarly has the number of those from elite schools. "[T]he top 26 universities and

40. Browsing through THE AALS DIRECTORY OF LAW TEACHERS, it becomes apparent that elite law professors are twice connected to elite law schools: as both graduates and as teachers.

41. THE FEDERALIST NO. 51, at 356 (James Madison) (Benjamin Fletcher Wright ed., Belknap Press of Harvard Univ. Press 1961) (1788) ("But it is not possible to give each department an equal power of self-defense. In republican government, the legislative authority necessarily predominates.").

42. Both voters (who elect the legislative and the president) and their leaders (the trustees of the public's well being) start working on achieving their potential in school. Their process to become Marx's Homo Faber continues in universities and graduate schools. See JOHN LOCKE, TWO TREATISES OF GOVERNMENT 188 (Thomas I. Cook ed., Hafner Publ'g Co. 6th ed. 1965) (1690) ("This legislative is not only the supreme power of the commonwealth, but sacred and unalterable in the hands where the community have once placed it . . ."). See also *id.* at 245 ("The people shall be judge . . . whether his trustee or deputy acts well and according to the trust reposed in him . . ."). Marx's Homo Faber is an open-ended concept which views Man as a process towards achieving her potential. See Alan G. Nasser, *Marx's Ethical Anthropology*, 35 PHIL. & PHENOMENOLOGICAL RES. 484, 493 (1975). Thus, it is opposed to Arendt's Homo Faber, often limited to concrete aspects of realized manhood limited to craftsmen, merchants, etc. See Hanna Fenichel Pitkin, *Justice: On Relating Private and Public*, 9 POL. THEORY, 327, 333 (1981). A rather different explanation can be found in *Cultural Software: A Theory of Ideology*. See BALKIN, *supra* note 3, at 23 (the offered translation is "Man the Toolmaker").

43. David Brooks, *Republicans for Dean*, N.Y. TIMES, Sept. 16, 2003, at A25.

44. Table 246 — *Earned degrees conferred by degree-granting institutions, by level of degree and sex of student: 1869-70 to 2011-12*, EARNED DEGREES CONFERRED (U.S. Dept. of Educ./Nat'l Ctr. for Educ. Statistics, Washington, D.C.), Nov. 2002, at 298.

colleges represent . . . 1% of these students."⁴⁵ The increase in the number of such graduates has only cemented their significant leadership role.⁴⁶

The relationship between the growth in the nation's number of college graduates and its effect on this nation's future, on one hand and the need for exposing college students to a wide array of ideas, on the other hand, was succinctly intimated to by Justice Powell twenty-five years ago, when he delivered the Supreme Court's decision in *Regents of University of California v. Bakke*.⁴⁷ Justice Powell observed that the "nation's future depends upon leaders trained through wide exposure to . . . ideas."⁴⁸

More recently, Justice O'Connor in *Grutter v. Bollinger*⁴⁹ summarized the leadership role played by law school graduates — especially those graduating from elite law schools. Although, Justice O'Connor expressly identified only one type of leadership role played by the graduates of the "handful" of highly coveted law schools (the Ivy League and other elite schools) — that of molding our judicial system — their other roles as prominent members of the legislative and executive body can easily be inferred from her mentioning the role played by *all* law school graduates.

Universities, and in particular, law schools, represent the training ground for a large number of our Nation's leaders. . . . Individuals with law degrees occupy roughly half the state governorships, more than half the seats in the United States Senate, and more than a third of the seats in the United States House of Representatives. . . . The pattern is even more striking when it comes to highly selective law schools. A handful of these schools accounts for 25 of the 100 United States Senators, 74 United States Courts of Appeals judges, and nearly 200 of the more than 600 United States District Court judges.⁵⁰

45. Scott Davies & Neil Guppy, *Fields of Study, College Selectivity, and Student Inequalities in Higher Education*, 75 SOC. FORCES 1417, 1433 (1997).

46. For example, out of President Carter's 56 appointees to United States Court of Appeals' judgeships, 41.1% were law graduates from Ivy League Schools, and 19.6% graduated from other private law schools. Out of President Reagan's 78 appointees, 23.1% graduated from Ivy League law schools, and 35.9% graduated from other private law schools. Out of the first President Bush's 37 appointees, 29.7% were Ivy league law school graduates, and 40.5% graduated from other private law schools. Finally, out of President Clinton's 48 appointees, 35.4% were Ivy league law school graduates, and 25.0% graduated from other private law schools. *Table 1.44, Characteristics of Presidential Appointees to U.S. Courts of Appeals Judgeships, By Presidential Administration, 1963-98*, in BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, 1998 SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 58 (1999).

47. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

48. *Id.* at 313 (quoting *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967)).

49. 539 U.S. 306 (2003).

50. *Id.* at 332.

This trend will continue, especially for graduates from elite schools, because they, more than any other graduates, are brought up to have a certain self-image — that “of a strong likelihood of succeeding in the practice of law and *contributing in diverse ways to the well-being of others*.”⁵¹ The last President (Bill Clinton) — as well as the current one (George W. Bush),⁵² for example — are Ivy League (Yale) products.

Thus, if elite (law) schools’ graduates represent this “Nation’s leaders,”⁵³ and their beliefs are shaped significantly during their higher education, then it only makes sense that university discourse should be as inclusive as possible and incorporate alternative theories that only forge one’s better understanding of the world.⁵⁴ In a representative democracy,⁵⁵ leaders are expected to represent all their constituents⁵⁶ including the poor,⁵⁷ — although many of them have lost their right to vote.⁵⁸ Moreover, in our democracy with global extensions,⁵⁹ our leaders are also expected to understand the rest of the world — the billions of the have-nots. Marxism, through its focus on economic factors would force us to take their interests into account.

This section of the article argued in favor of John Stuart Mill’s principle of “market of ideas” because elite law schools have the potential to shape our leaders’ actions. They create legal knowledge and legitimize ideologies. The next section will continue the argument by pointing out that indeed Marx’s writings are mainly overlooked.

51. *Id.* at 314 (emphasis added).

52. David Brooks, *Bred For Power*, N.Y. TIMES, Sept. 13, 2003, at A13.

53. *Gutter*, 539 U.S. at 308.

54. See generally MILL, *supra* note 4, at chapter II, para 1, and Seth Mydans, *Communist Revolt is Alive, and Active, in the Philippines*, N.Y. TIMES, Mar. 26, 2003, at A3.

55. For a comprehensive discussion about political representation, see Jurgen Habermas, *The Public Sphere*, in RETHINKING POPULAR CULTURE, *supra* note 7, at 398, 400.

56. *Squeezing the Poor for Votes*, N.Y. TIMES, Feb. 18, 2004, at A18 (stressing the fact that the current administration does not represent the interests of the poor, jeopardizing the aid for 2 million people to offer a “\$45 billion boon in this year alone” to the richest 1%).

57. *Harper’s Index*, HARPER’S MAG., Mar. 2004, at 11 (“Percentage of Americans living below the poverty level who voted in the 2000 presidential election: 38.”).

58. See, e.g., Diane Cardwell, *What Do New Yorkers Want in a President?; Wishes and Whines Are Like Everyone Else’s*, N.Y. TIMES, Feb. 28, 2004, at B1 (underprivileged minority members lost their right to vote as felons convicted on drug charges).

59. For a recent overview of the American world power, see, e.g., NIALL FERGUSON, *EMPIRE: THE RISE AND DEMISE OF THE BRITISH WORLD ORDER AND THE LESSONS FOR GLOBAL POWER* (Basic Books 2003) (2002).

II. IS MARXISM TRULY IGNORED?

Marxism⁶⁰ is usually described as "a comprehensive theory which articulates the principal lines of historical human development as a whole."⁶¹ Jon Elster refuses to define it per se but lets us understand that Marxism could be viewed as theoretical developments of Marx's writings.⁶² Thus, at a minimum, Marxism is Marx's writings, and this is its meaning here.

Marxism includes both a specific conception of the good life, and a specific notion of distributive justice, in addition to a theory of history and an analysis of capitalism.⁶³

Marxism can be taught as part of many university courses, including as a theory of social development and as an identity theory.⁶⁴ As an identity theory, for example, it is useful as it highlights socio-economic distinctions among the majority of the members from different minority groups.

Socio-economic identity is more than cultural ornament⁶⁵ or as an innocuous quaint parallel reality.⁶⁶ Marxism is the only theory which

60. Defining Marxism is not an easy task. Sometimes even so-called Marxist writers refuse to define it. See GERALD ALLEN COHEN, *KARL MARX'S THEORY OF HISTORY: A DEFENCE* (Princeton Univ. Press 2000) (1978).

61. Perry Anderson, et al., *Agendas for Radical History*, 36 *RADICAL HISTORY REV.* 26, 52 (1986).

62. JON ELSTER, *AN INTRODUCTION TO KARL MARX* 79-103 (Cambridge Univ. Press 1986).

63. *Id.* at 4.

64. One main reason for ignoring Marxism may be general academic misunderstanding regarding its merits, and not an overweening academic position that theories are dead (supported by luminaries such as Terry Eagleton and Henry Louis Gates Jr.). See, e.g., Dinitia Smith, *Cultural Theorists, Start Your Epitaphs*, N.Y. TIMES, Jan. 3, 2004, at B7; Emily Eakin, *The Latest Theory Is That Theory Doesn't Matter*, N.Y. TIMES, Apr. 19, 2003, at D9.

65. See, e.g., the online ad for the MTV show, *Rich Girls*, at http://www.mtv.com/onair/rich_girls, which states:

Meet Ally Hilfiger and Jaime Gleicher: normal teenagers who enjoy doing normal teenage things like shopping, talking on the phone, and going to the prom. But there's one important difference between them and the rest of us — they're rich. Really, really, really rich. Get a first-hand look at their super-fabulous life when MTV follows two of the wealthiest teens on the planet to see how they spend their mountains of money.

66. See, e.g., Matthew Gilbert, *"Born Rich" Reveals Privileged Information*, BOSTON GLOBE, Oct. 27, 2003, at D16.

(Director Jamie Johnson . . . is tormented by the idea that people with money refuse to talk about money. "It's like this big taboo always lurking under the surface," he says . . . "Born Rich" is Johnson's revenge on the conspiracy of silence of his childhood . . . Also, it has turned Johnson into a pariah, ousted from his rarefied circles for breaking the code. And after seeing "Born Rich," you can understand the reasoning behind the taboo: the crazy rich really can't talk about the trials of being crazy rich and still evoke much sympathy.).

demystifies the fashionable non-class divisions of today, and helps us understand that "cultural divisions," as Jon Elster demonstrated, "are never class neutral. It is invariably the case that classes are distributed non-randomly over cultural groups"⁶⁷ and, one may add, over minority groups, too. Additionally, Marxism offers an identity to the millions of have-nots,⁶⁸ the many more that struggle "to pay their mortgages and get their children off to college,"⁶⁹ and also to the few that don't understand either poverty or struggle.

However, in a society that still views itself as mostly middle class,⁷⁰ and whose cultural taboo is talking about money,⁷¹ there is little interest in talking about the "economically other" and demystifying the myth of the middle class.⁷² Thus, it is understandable why there is such little interest in offering courses about Marxism, especially in elite schools.

There is a scarcity of courses that teach Marxism — a set of ideas that originated with Karl Marx and which is usually associated with foreign lands, as there is a lack of academic debate about the present value of such a theory. However, this scarcity becomes more and more problematic especially today when both our leaders and we as a people seem to have forgotten to behave rationally as a nation. If once spending more than earning would have given one a cause to worry, today we are happily indebted both individually and collectively, as a nation, at levels that may dramatically hamper our future political actions.⁷³ It seems as if the raging right-wing forces have successfully shaped and manipulated our "collective fantasies."⁷⁴ However, the academe seems unfazed these days.

Three decades ago, in 1972, at Harvard, then a year later at Yale and other campuses, academia considered whether to include or not to include Marxist studies in the (Ivy League) academic curricula.⁷⁵ That debate echoed the somber timbre of Shakespeare's foreboding words spoken by

67. ELSTER, *supra* note 3, at 392.

68. *Boom Times on the Poverty Roll*, N.Y. TIMES, Sept. 30, 2003, at A28 ("The poverty roll rose to 34.6 million people," which can also be translated as 12 out of 100 Americans are currently impoverished.).

69. Bob Herbert, *There's a Catch: Jobs*, N.Y. TIMES, Oct. 27, 2003, at A21.

70. Some discussion along these lines has been recently generated by Presidential candidate Howard Dean. See Paul Krugman, *Flags Versus Dollars*, N.Y. TIMES, Nov. 7, 2003, at A27.

71. SIGMUND FREUD, TOTEM AND TABOO; SOME POINTS OF AGREEMENT BETWEEN THE MENTAL LIVES OF SAVAGES AND NEUROTICS (James Strachey trans., W.W. Norton & Co. 1952) (1950).

72. Julia Chaplin, *Biting the Silver Spoon That Feeds Him, on Film*, N.Y. TIMES, Oct. 12, 2003, at § 9 (Magazine).

73. For a brief but concise analysis see, e.g., Anna Quindlen, *No Principle, Just Interest*, NEWSWEEK, Feb. 7, 2005, at 68.

74. Peter Gabel & Jay M. Feinman, *Contract Law As Ideology*, in THE POLITICS OF LAW A PROGRESSIVE CRITIQUE 172 (David. Kairys ed., Pantheon Books 1982).

75. Lifschultz, *supra* note 7, at 279.

Hamlet in his famous soliloquy. "To be, or not to be, that is the question:/Whether 'tis nobler in the mind to suffer/The slings and arrows of outrageous fortune,/Or to take arms against a sea of troubles,/And by opposing end them? To die: to sleep" ⁷⁶ Today its terms have changed. To the extent that the debate still exists, it brings to mind a different version of Hamlet's soliloquy, the one the "duke" taught the "king" in *Huckleberry Finn*: ⁷⁷ [t]o be, or not to be; that is the bare bodkin/That makes calamity of so long life. ⁷⁸ However, a problem does not simply disappear by ignoring it, or a theory does not lose its potential usefulness if overlooked.

Additionally, it is worth noting that books on Marx, such as Ira Katznelson's *Marxism and the City*, ⁷⁹ are not published here, but across the Atlantic, in the United Kingdom. *Lloyd's Introduction to Jurisprudence*, ⁸⁰ a recently updated anthology on legal thought that also covers domestic legal academic works on Marxism was published there too. Of course, there have been books published on Critical Legal Studies ("CLS"), ⁸¹ which is the home-grown mild version of Marxism, but nevertheless viciously attacked, ⁸² as there have been books published on post-modern versions of CLS — but they tend to be surprisingly anti-Marxist in essence. ⁸³

If Columbia University ("CU") and its course bulletins are an example, elite schools seem to be offering fewer courses on Marxism at the undergraduate level. The number of CU courses that use Marxist readings or even the word "Marxism" in their course description has steadily decreased since the mid 1990s, ⁸⁴ when after more than two decades, its

76. WILLIAM SHAKESPEARE, *THE TRAGEDY OF HAMLET, PRINCE OF DENMARK*, act 3, sc. 1 (The Odyssey Press, Inc. 1963) (1601).

77. MARK TWAIN, *ADVENTURE'S OF HUCKLEBERRY FINN* (Barnes & Noble, Inc. 1996) (1885).

78. Lawrence Levine, *William Shakespeare and the American People*, in *RETHINKING POPULAR CULTURE*, *supra* note 7, at 157.

79. IRA KATZNELSON, *MARXISM AND THE CITY* (Oxford Univ. Press 1992).

80. MICHAEL DAVID ALLEN FREEMAN, *LLOYD'S INTRODUCTION TO JURISPRUDENCE* (Sweet & Maxwell, Ltd., 7th ed. 2001) (1959). Although recently published it contains works by well established scholars who cannot lose anything if they find themselves (eccentrically) associated with the M word.

81. See, e.g., *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* (David Kairys 3d ed., 1998) (its three editions comprise a most representative compilation of writings by CLS authors).

82. See, e.g., Maurice J. Holland, *A Hurried Perspective on the Critical Legal Studies Movement: The Marx Brothers Assault the Citadel*, 8 HARV. J.L. & PUB. POL'Y 239, 239 (1985).

83. It is this author's opinion that identity politics theories appeared out of their authors' feeling of inadequate representation by Marxism.

84. See, e.g., *Columbia University Bulletin 1961/62 through 1994/1995* (Columbia Univ., New York, N.Y.), 1961-1995.

only course dedicated to Marxism⁸⁵ ceased to be part of the curriculum. From the 1960s through the early 1990s there were scores of CU courses whose acknowledged readings covered Marxist works. They were taught within the Contemporary Civilization Program,⁸⁶ and of the Philosophy, Government (then Political Science), and Sociology departments.⁸⁷ Today the realm of Marxist thought has been delegated to one of the undergraduate core courses,⁸⁸ and a couple of undergraduate introductory courses.⁸⁹

Similarly, presently elite law schools seem to stay away from Marx and his work as well. While currently Columbia, Cornell,⁹⁰ Yale,⁹¹ and Stanford Law Schools⁹² offer no courses that incorporate Marxist readings, Harvard⁹³ and the University of Pennsylvania Law Schools⁹⁴ each offer one

85. See, e.g., *C4068 Columbia University Bulletin 1969/70* (Columbia Univ., New York, N.Y.), 1969, at 201; *G4007 Columbia University Bulletin 1975/76* (Columbia Univ., New York, N.Y.), 1975, at 189; *Columbia University Bulletin 1984/85* (Columbia Univ., New York, N.Y.), 1984, at 266. The course was not listed in *Columbia University Bulletin 1994/95*.

86. This program ceased in 1990 when it became undergraduate course W4638. See *Columbia University Bulletin 1990/01* (Columbia Univ., New York, N.Y.), 1990, at 301. This course still requires Marxist readings. See *Contemporary Civilization C1101-C1102: Introduction to Contemporary Civilization*, at <http://www.college.columbia.edu/core/classes/cc.php> (last visited Apr. 13, 2005).

87. See *Columbia University Bulletin 1969/70 through 1994/95* (Columbia Univ., New York, N.Y.), 1969-1995.

88. *Contemporary Civilization C1101-C1102: Introduction to Contemporary Civilization*, available at <http://www.college.columbia.edu/core/classes/cc.php>.

89. *W3660 — Modern Political Thought* and *W4134 — Political Sociology*. See *Columbia University Bulletin 2003/04* (Columbia Univ., New York, N.Y.), 2003, at 487-88.

90. See CORNELL LAW SCHOOL 2004-05 COURSE DESCRIPTIONS, available at http://support.law.cornell.edu/students/forms/Current_Course_Descriptions.pdf (last visited Apr. 13, 2005).

91. See BULLETIN OF YALE UNIVERSITY LAW SCHOOL, available at <http://www.yale.edu/bulletin/html2002/law/course.html>. It should be noted that once Yale had a pro-Marxist curriculum, when Trubek taught property and Kennedy was a student there or when Heller was involved in Critical Marxism. See, e.g., John Henry Schlegel, *Toward and Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies*, 36 STAN. L. REV. 391 (1984); Phillip E. Johnson, *Do you Sincerely Want to Be Radical?*, 36 STAN. L. REV. 247 (1984); Louis B. Schwartz, *With Gun and Camera Through Darkest CLS-land*, 36 STAN. L. REV. 413 (1984).

92. See STANFORD LAW SCHOOL COURSES, available at <http://www.law.stanford.edu/courses> (last visited Apr. 13, 2005). While it offers a course in *Jurisprudence*, its description does not mention Marxist readings.

93. The Harvard Law School mentions two courses whose descriptions require their students to read Marx: *Central Ideas of Contemporary Law and Legal Thought*, *Social Theory and Political Philosophy Now: Seminar*. Neither class is offered this academic year. Taught by Prof Unger, they both cover readings from Marx's works. See HARVARD LAW SCHOOL ELECTIVE COURSES, READING GROUPS AND SEMINARS, available at <http://www.law.harvard.edu/academics/registrar/catalog/electives.html> (last visited Apr. 13, 2005).

course that mentions the use of Marxist readings in its description. In a class of its own, the University of Michigan Law School offers a course entitled "Idea of Equality," but its online description omits Marxist readings: "[r]eadings will be drawn almost exclusively from *non-legal sources*, works of philosophy, literature, and sociology. Among the readings: John Locke, Jean-Jacques Rousseau; Edmund Burke, Mary Wollstonecraft; Alexis DeTocqueville; W.E.B. DuBois; Edith Wharton; Yevgeny Zamiatin, Simone DeBeauvoir; Zora Neale Hurston and John Rawls."⁹⁵

It appears that indeed most elite law schools and the majority of the Ivy League ones⁹⁶ do not seem to see any value in Marx's writings. Their curricula do not include them either in support of a socio-economic identity (rather than gender, race, or social orientation), or of a critique of the rights theory.

The next section will further continue the argument in favor of legal curricula that mirror John Stuart Mill's market of idea. Its two examples want to illustrate how apparently identical individual rights differ according to the socio-economic status of the rights' holder. To the extent that engaging in such a critique is a desired academic outcome, this article argues, teaching Marx's writings — as the last section would show — becomes necessary.

III. HOW CAN MARXISM STILL ADVANCE LEGAL KNOWLEDGE TODAY?

The next two examples focus on the unexpected economic component on apparently non-economic rights. As shown below, their analysis would only benefit from a legal vocabulary that includes Marx's writings.

Both of them — the right to bear or beget a child and the right to vote — inadequately depend on their holder's economic circumstances, although they are not economic rights, such as property rights which one expects to be equally available only formally. Furthermore, in the "liberal catalogue"⁹⁷ of rights, the right to vote is a political right and one expects such rights to be distributed equally to all both formally and substantially.

A woman can exercise her right to choose to bear or beget a child if she is able to pay for the necessary medical services. As I argued

94. University of Pennsylvania Law School offers a course in *Jurisprudence* which mentions the word "Marxists" in its description. See UNIVERSITY OF PENNSYLVANIA LAW SCHOOL ALPHABETICAL COURSE DESCRIPTIONS, available at <http://www.law.upenn.edu/registrar/descriptions/descriptions.html> (last visited Apr. 14, 2005).

95. THE UNIVERSITY OF MICHIGAN LAW SCHOOL COURSE DESCRIPTIONS, available at http://cgi2.www.law.umich.edu/_ClassSchedule/aboutClass.asp?term=1510&classNbr=31528 (last visited Apr. 14, 2005) (emphasis added).

96. The Ivy League law schools are: Columbia, Harvard, Yale, Stanford, Cornell, and University of Pennsylvania.

97. David Miller, *Democracy and Social Justice*, 8 BRIT. J. POL. SCI. 1, 4 (1978).

elsewhere,⁹⁸ its exercise depends on the economic status of the pregnant woman. Thus, one may say that what the proponents of this right arguably won in the famous *Roe v. Wade*,⁹⁹ they actually lost seven years later in *Harris v. McRae*¹⁰⁰ when they failed to ensure public funds for abortions that would have empowered poor women in their sexual quest for gender equality.¹⁰¹ However, that is only partially true. Adult middle-class women¹⁰² — and not the destitute ones — had always been the intended beneficiaries of this new right. As pollster Tubby Harrison noted in 1984, poor women were never the intended beneficiary of this new right:

The public opposes the use of federal funds to pay for abortions for *poor women* by 55% to 42%, with that margin growing to 62% to 36% when the words “*women on welfare*” are substituted for “*poor women*” . . . in the case of “*poor women*,” strong opposition outweighs strong support by a little over 2 to 1; in the instance of “*welfare women*,” the margin leaps more than 4 to 1.¹⁰³

Similarly, exercising one's right to vote is deeply dependent on one's economic resources. While some may think that the Reconstruction Constitutional amendments solved the franchise issue for the Southern male African-Americans,¹⁰⁴ and that the Nineteenth Amendment meant that

98. A more detailed analysis of this right and how it plays on paper versus in reality is contained in another law review article. See Dana Neacșu, *Tempest in a Teacup*, 38 GONZ. L. REV. 601 (2003).

99. 410 U.S. 113 (1973).

100. 443 U.S. 297 (1980).

101. WILLIAM SALETAN, *BEARING RIGHT: HOW CONSERVATIVES WON THE ABORTION WAR* (Univ. Cal. Press 2003).

102. The abortion proponents failed also to prohibit parental-notice or consent provisions for minors seeking abortions. The United States Supreme Court has addressed the validity of parental notice and consent provisions in abortion statutes in many decisions. See, e.g., *Lambert v. Wicklund*, 520 U.S. 292 (1997); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502 (1990); *Hodgson v. Minnesota*, 497 U.S. 417 (1990); *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416 (1983); *Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476 (1983); *H.L. v. Matheson*, 450 U.S. 398, 409 (1981) (noting that a requirement of parental notice is constitutionally sound); *Bellotti II*, 443 U.S. 622 (1979); *Bellotti v. Baird*, 428 U.S. 132 (1976); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); and *Zbaraz v. Hartigan*, 763 F.2d 1532 (7th Cir. 1985), *aff'd by* an equally divided court, 484 U.S. 171 (1987). For more on the constitutional parameters of reproductive autonomy, as they pertain to a pregnant minor's access to abortion, see Kathryn D. Katz, *The Pregnant Child's Right to Self-Determination*, 62 ALA. L. REV. 1119 (1999). See also SALETAN, *supra* note 101, for a more recent account of this issue.

103. SALETAN, *supra* note 101, at 14-15.

104. STEVEN LAWSON, *BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH, 1944-1969* (Columbia Univ. Press 1976).

the suffrage was won for women,¹⁰⁵ socio-economic reality shows these issues are far more complex than their paper-based solutions would indicate.

As the right to vote is sanctioned by the United States Constitution,¹⁰⁶ one expects that the United States government will benefit from "equal concern and respect."¹⁰⁷ Ronald Dworkin, for example, talks both about the right to vote and about its effective exercise, and mentions the citizens' voting powers to exemplify their right to equal treatment.¹⁰⁸ "The Supreme Court . . . held that citizens have a right to equal treatment in the distribution of voting power . . ."¹⁰⁹ Thus, there is a good argument that each citizen expects equal voting power and that the right to vote covers that power.

In light of this argument it only makes sense that all campaign spending should be limited and it should be covered either by tax money for all candidates or by limited contributions that all individual voters could afford.¹¹⁰ Otherwise the voting power of someone with more economic power (money) will not be equal to that of another one with less or no economic power. The voter who can afford to broadcast her choice of a candidate will likely succeed in influencing the choice of the voter with fewer assets. The latter's choice while personal often remains open to change under pressure from media outlets which depict the affluent one's choices as more interesting or viable.

Thus, the current debate on campaign finances involves more than one's freedom of speech. It concerns the citizens' voting powers, and thus their right to vote. Spending money on campaigning has a clear impact on how citizens effectively exercise their franchise. Money gives the wealthy (corporations) a megaphone while the rest of us can only whisper our choices. While we all have the right to vote, our voting power, as shown above, depends on either our candidate's socio-economic background — his financial prowess — or on the finances of the groups that support his candidacy and whose interests he represents.

105. WOMEN'S RIGHTS IN THE UNITED STATES: A DOCUMENTARY HISTORY 136 (Langley & Fox eds., Greenwood Press 1994).

106. U.S. CONST. amend. XIV, § 1.

107. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 273 (Harvard Univ. Press 1977).

108. *Id.*

109. *Id.*

110. See *Dean Skipping Public Financing*, Burlington, Vt., Nov. 8, 2003, available at <http://www.columbia.edu/cu/libraries/indexes/isi-emer-markets.html>. Former presidential candidate Howard Dean supported such a campaign finance reform that would limit campaign contributions many times under the current cap of \$2,000.

The present debate mostly involves the McCain-Feingold law¹¹¹ — also known as the Bipartisan Campaign Reform Act of 2002 (“BCRA”). As soon as the McCain-Feingold law was passed, eighty-four plaintiffs filed a variety of lawsuits.¹¹² The plaintiffs were from both the right — i.e., United States Senator Mitch McConnell, R-Kentucky — and the left — i.e., the California Democratic Party. Eventually, those lawsuits became consolidated into one case, *McConnell v. FEC*.¹¹³

On September 8, 2003,¹¹⁴ the Supreme Court heard arguments in this case, and although the debate is draped in a “First Amendment” cloak, there is little doubt that the fight is about voting and buying those votes. It is about capping the “corruption in the political system by regulating the prevalence of money.”¹¹⁵

On December 10, 2003, the Supreme Court upheld three provisions of the BCRA in *McConnell v. FEC*.¹¹⁶ Those provisions regard the control of soft money¹¹⁷ and the regulations of electioneering communications.¹¹⁸ The Justices writing for the majority, Sandra Day O’Connor and John Paul Stevens viewed them as valid Congressional efforts to prevent corruption. They explained that “access to federal officeholders is the most valuable favor the national party committees are able to give in exchange for large donations.”¹¹⁹

These two examples only point out that rights in themselves are not the necessary and sufficient answer to the quest for a democratic government. Without attempting to create social justice,¹²⁰ the interests of

111. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002). The bill was sponsored by United States Senators John McCain, R-Arizona, and Russell Feingold, D-Wisconsin, and Representatives Christopher Shays, R-Connecticut, and Martin Meehan, D-Massachusetts.

112. See *McConnell, Senator v. FEC* (No. 02-1674); *NRA v. FEC* (No. 02-1675); *FEC v. McConnell, Senator* (No. 02-1676); *McCain, Senator v. McConnell, Senator* (No. 02-1702); *RNC v. FEC* (No. 02-1727); *Nat. Right to Life v. FEC* (No. 02-1733); *ACLU v. FEC* (No. 02-1734); *Adams, Victoria J. v. FEC* (No. 02-1740); *Paul, Congressman v. FEC* (No. 02-1747); *Cal. Democratic Party v. FEC* (No. 02-1753); *AFL-CIO v. FEC* (No. 02-1755); *Chamber of Commerce v. FEC* (No. 02-1756).

113. 540 U.S. 93 (2003). See docket No. 02-1674, available at <http://search.access.gpo.gov/supreme-court/SearchRight.asp?ct=Supreme-Court-Dockets&q1=02-1674> (last visited Apr. 18, 2005).

114. *Id.*

115. *Reform's Day in Court*, WASH. POST, Sept. 9, 2003, at A22. See also *The Case for McCain-Feingold*, N.Y. TIMES, Sept. 7, 2003, § 4, at 12.

116. *McConnell*, 540 U.S. at 93.

117. For a more detailed explanation of the BCRA provision that prohibited national parties from raising or spending soft money, see Sarah Borchers-Keto & John Scanlan, *Supreme Court Upholds Central Tenets of BCRA*, CCH FEDERAL ELECTION CAMPAIGN FINANCING GUIDE — 344 LAST REPORT LETTER 1, 2-3 (Dec. 19, 2003).

118. *Id.* at 3-4.

119. *McConnell*, 540 U.S. at 155.

120. For a general discussion on social justice see Miller, *supra* note 97, at 1-3 (1978).

those who cannot afford what the judiciary (for the right to choose) and the legislature (for the right to vote) take for granted as being available to all, are ultimately ignored.

The next section will finalize the argument in favor of liberal legal education along the lines of John Stuart Mill's "market of ideas." It will briefly outline some of the concepts found in Marx's writings. Some are among the most vilified ones — because they incorporate a high degree of abstractness and thus do not satisfy the current needs for nuance. They are the concepts of mode of production, forces of production, relations of production, base, superstructure, classes and class struggle. They are mentioned here because there is nothing infamous about them, and because, as mentioned below, they provide a different perspective in analyzing law and society. Finally, a brief discussion about law and state and ideology will end the section.

IV. DESPITE GENERALIZED ACADEMIC RELUCTANCE, MARX'S WRITINGS PRESERVE THEIR RELEVANCY

There are many reasons to shy away from teaching Marx's writings.¹²¹ Once they were part and parcel of "the orthodoxy of ruling parties in much of the [third] world."¹²² They have also been associated with anti-American violent political movements¹²³ and, domestically, with dubious personalities¹²⁴ or questionable platforms. But there is no USSR to fear

121. This article does not discuss the 1970's fear of indoctrination and overthrowing the liberal and pluralist values of academic life as a potential reason for ignoring Marxism in the 21st century. For a taste of that 70's fear, see Ian Bradley, *Marxists in Higher Education, Part I*, N.Y. TIMES, Nov. 17, 1977, at G1. Similarly it does not discuss the potential fear of becoming a mere epigone. Until a few decades ago, Marxism had produced too many epigones. Most of them lost themselves in failed rescuing operations and perhaps gave pause to others in becoming Marxist — who in Jon Elster's definition is someone who can trace the ancestry of his most important beliefs back to Marx. ELSTER, *supra* note 62, at 79-103. There were scientific Marxists (such as Althusser, Balibar and the new Left Review), who were more "economistic in their analysis," contrasting with the voluntary critical Marxists (such as Lukács, Korsch, and the theorists of the Frankfurt School). KATZNELSON, *supra* note 79. For details see ALVIN WARD GOULDNER, *THE TWO MARXISMS: CONTRADICTIONS AND ANOMALIES IN THE DEVELOPMENT OF THEORY (HIS THE DARK SIDE OF THE DIALECTIC; VOL. 3)* (Seabury Press 1980).

122. FREEMAN, *supra* note 80, at 958.

123. See, e.g., Mydans, *supra* note 54. (Even in the Middle East, a place of recent American involvement, Marxism may still be a vibrant set of ideas, as Syria and Iraq, for example were once within the sphere of influence of the Soviet block.). For a review of the Soviet involvement in the Middle East and its changes during the so-called Cold War, see, e.g., Dina Rome Spechler, *The U.S.S.R. and Third-World Conflicts: Domestic Debate and Soviet Policy in the Middle East, 1967-1973*, 38 WORLD POL. 435 (1986).

124. Such as the New York City local personality and former presidential candidate, Lenora Fulani. See, e.g., Benjamin Smith, *Bloomberg Donates \$50,000 to Group Linked to Fulani Anonymous Gift Went to Center She Founded*, N.Y. SUN, July 17, 2002; Adam Dickter, *The Fulani Factor. Radical Activist's Prominence in Local Politics*, THE JEWISH WK., Aug. 9, 2002. ("[She] isn't running for anything this year, but *the Marxist activist* and

anymore and violence — as a sometimes necessary democratic political tool — was legitimized both in the Federalist Papers,¹²⁵ and by our recent actions in Iraq where some people had to die so other could vote.¹²⁶

Marx's writings may have been ignored lately because they can be viewed as giving voice only to destitute people. As Lewis Feuer — a Marxist theoretician — stated, Marxism may be ignored because it brings the “perspective of the lowest class.”¹²⁷ Truth be said, neither the elite schools' faculty nor their student body¹²⁸ contain destitute people,¹²⁹ even if their number is on the rise. However, even as such its want may be shortsighted. While its absence may make it easier for students from prosperous schools “to ignore the people who sweep their dorms, tend their manicured quads and dole out burgers at the campus food court,”¹³⁰ it also leaves them unprepared for the world outside the ivory tower.¹³¹

Thus, while it can be argued that there is thus no real interest to reintroduce Marxism in the legal curricula when “more complex” perspectives, such as those aware of “a variety of distinctions” that include race and sexual orientations are currently available, perhaps Lewis Feuer's answer is nevertheless persuasive. He states that Marxism remains a valid theory because “[its] bold vision does grasp more of historical reality than the more complex” ones.¹³²

frequent candidate — who has made controversial statements about Jews, Israel and the Sept. 11 attacks — is fast becoming one of the most talked-about personalities on the political scene.”) (emphasis added).

125. War, when just, is acceptable. See THE FEDERALIST NO. 3, at 95 (John Jay) (Benjamin Fletcher Wright ed., Belknap Press of Harvard Univ. Press 1961) (1788) (“The just causes of war, for the most part, arise either from violation of treaties or from direct violence.”) (emphasis in original).

126. *Quotation of the Day*, N.Y. TIMES, FEB. 1, 2005, at A2 (Nelson Carman, whose twenty-year-old son died while fighting in Iraq: “[w]e all want success in Iraq, especially us who lost sons. To see the Iraqi people thumbing their nose at insurgents and terrorists and saying, ‘We’re going to go vote,’ there’s a sense of pride and yet it can be sobering.”).

127. MARX AND ENGELS: BASIC WRITINGS ON POLITICS AND PHILOSOPHY xviii (Lewis S. Feuer ed., Anchor 1959) [hereinafter MARX AND ENGELS: BASIC WRITINGS].

128. Davies & Guppy, *supra* note 45, at 1433 (“These universities house many graduates from the nation’s most prestigious prep schools, whose students hail from families that earn 400% more than the median American family.”).

129. Of course, it is beyond the scope of this article to make the argument that despite the fact that the number of people living below the poverty line has increased as well as the number of those slumping into poverty, that number does not really count in our democracy as the have-nots have no voice in our democracy — because they either do not vote or do not have the right to vote (as former felons, for example). See *supra* note 68.

130. Marc Santora, *Walls of Ivy, Tangled with Pickets*, N.Y. TIMES, Sept. 7, 2003, at §37 (Magazine). Although Yale College offers more courses focused on Marxism this Fall 2003, than, for example, Columbia College.

131. See *supra* note 129.

132. MARX AND ENGELS: BASIC WRITINGS, *supra* note 127.

But not only the "lowest class" (the poor) is economically identifiable. Even the rich are part of the class structure,¹³³ and thus described in terms of their economic prowess. In fact, Marxist discourse transcends the interests of a specific group. As Raymond Williams observed, it helps us understand how the economic component of our lives sets limits and exerts pressures on our daily choices.¹³⁴ Extrapolated to law, as shown here we enjoy only the rights we can afford.

Marxism prides itself in exfoliating social appearances and finding the common denominator among social realities.¹³⁵ Marx reduced society — the space of human interaction — to its raw essence: to an economic and a non-economic component.¹³⁶

He called the economic component "the real basis."¹³⁷ Thus, the non-economic component, by way of consequence, became "superstructure." These concepts allowed Marx to explain "the mode of production of material life,"¹³⁸ which brings together "the social, political and intellectual life process in general."¹³⁹

133. See also the now hip and famous HBO-coined-pop-discourse about "traitor to your class." Chaplin, *supra* note 72.

134. Williams, *supra* note 7, at 407-08. For a more convoluted discussion on this issue see, e.g., HERBERT J. GANS, *POPULAR CULTURE AND HIGH CULTURE: AN ANALYSIS AND EVALUATION OF TASTE* (Basic Books 1984). The author shows how people's choices are related, and infers their economic common thread.

Choices are not made randomly. Research into consumer behavior and leisure indicates that choices are related; people who read *Harper's* or *The New Yorker* are also likely to prefer foreign movies and public television, to listen to classical (but not chamber) music, play tennis, choose contemporary furniture and eat gourmet foods.

Id. at 92.

135. Such an attitude has also been viewed as its liability. However, Marxism has had "a crucial impact not only on the development of the social and historical sciences since [Marx's] day, but also on the way in which most people perceive modern society." It demystifies social realities, and as Jon Elster also noted, at a minimum, its alienation and distributive justice theories remain useful in our postmodern society. Stephen Wilson, *Marxism in Higher Education*, *THE TIMES*, Nov. 19, 1977, at A15 (letter to the editor). For a detailed account of postmodernism see, e.g., EDGEWORTH, *supra* note 27.

136. See also Mark Neocleous, *Staging Power: Marx, Hobbes and the Personification of Capital*, 14 *LAW AND CRITIQUE* 147, 147-65 (2003) (analyzing the Marxist view of social interaction in capitalist societies).

137.

In the social production of their life, men enter into definite relations that are indispensable and independent of their will, relations of production which correspond to a definite stage of development of their material productive forces. The sum total of these relations of production constitutes the economic structure, the real basis, on which rises a legal and political superstructure.

KARL MARX, *Preface to A CONTRIBUTION TO THE CRITIQUE OF POLITICAL ECONOMY* 20 (1859), reprinted in COHEN, *supra* note 60.

138. KARL MARX, *Preface to A CONTRIBUTION TO THE CRITIQUE OF POLITICAL ECONOMY* (1859), reprinted in KARL MARX: A READER 187 (Jon Elster ed., 1986) ("[t]he

The mode of production, whose generality made it perhaps too obscure¹⁴⁰ wants to be a mere "way of producing"¹⁴¹ and perpetuating material life within a specific society. It functions "within the twin frame of the development of the technical characteristics of production [the forces of production] and the nature of the relationships joining people in the social features of the production process (the relations of productions) [read property rights]."¹⁴²

Marx used all these concepts in one paragraph. It comes from the *Preface to A Contribution to the Critique of Political Economy*:

In the social production which men carry on they enter into definite relations [that are the] relations of production. . . . The sum total of these relations of production constitutes the economic structure of society — the real foundation, on which rise legal and political structures and to which correspond definite forms of social consciousness. The mode of production in material life determines the general character of the social, political, and spiritual processes of life.¹⁴³

The last part of the paragraph has caused a lot of misery among Marxists. The turmoil surrounds the interplay between base "the economic structure of society"¹⁴⁴ and the superstructure, which includes the "legal and political structures."¹⁴⁵

In *The Poverty of Philosophy*, Marx further expanded on the interplay between base and superstructure. He stated that "a change in men's productive forces necessarily brings about a change in their relations of production,"¹⁴⁶ which later on brings a replacement of the existing mode of production with a new, more adequate one. Marx explained the changes from one mode to the next one,¹⁴⁷ by stating that at a certain stage of

mode of production of material life conditions the social, political, and intellectual life process in general.").

139. *Id.* For other Marxist definitions, see TERRY EAGLETON, *CRITICISM AND IDEOLOGY* 45 (1976) ("A mode of production may be characterized as a unity of certain forces and social relations of material production.").

140. KATZNELSON, *supra* note 79, at 28; see also COHEN, *supra* note 60, at 79 (the expression "mode of production" occurs "copiously in Marx's writings.").

141. COHEN, *supra* note 60, at 79.

142. KATZNELSON, *supra* note 79, at 46.

143. KARL MARX, *Preface to A CONTRIBUTION TO THE CRITIQUE OF POLITICAL ECONOMY*, reprinted in MARX AND ENGELS: *BASIC WRITINGS*, *supra* note 127, at 43.

144. *Id.*

145. *Id.*

146. KARL MARX, *A CONTRIBUTION TO THE CRITIQUE OF POLITICAL ECONOMY* (1859), reprinted in *THE POVERTY OF PHILOSOPHY* (N.Y. Int'l Publisher 1936) (1859).

147. COHEN, *supra* note 60, at 24-25 (describing the classless and the class-based modes of productions presented in the Marxist theory).

development the material forces "come into conflict"¹⁴⁸ with the existing relations of production (which cover property rights).

However the problem remains, because it is unclear how the superstructure influences the base and what exactly causes social change. As shown above, Marx's social structure included "the legal, political, religious, aesthetic, or philosophic — in short ideological [relations]."¹⁴⁹ The ideological relations were incorporated into one's beliefs — her consciousness. Finally, when he talked about consciousness, about one's beliefs, Marx became clearer and explained that "[i]t is not the consciousness of men that determines their being, but, on the contrary, their social being that determines their consciousness."¹⁵⁰

However, his entire discourse addresses only one type of social change — the one caused by a specific change of the economic base. Marx stated that "with the change of the economic foundation the entire immense superstructure is more or less rapidly transformed."¹⁵¹ He left unaddressed the question whether change can happen in other ways. In fact, G.A. Cohen clearly explained the Marxist view of socialism as needing both quantitative and qualitative prerequisites.¹⁵² Moreover, as further detailed below, the failure of the so-called socialist regimes did not offer an answer either. They only support Marx's thesis.

So the question about the prevalence of the economic foundation over the complex superstructure remains. From the famous passage that was reproduced above, scholars have interpreted the superstructure as an "expression" or a "reflection" of the base.¹⁵³ However, this is only one possible interpretation.

G.A. Cohen interprets the base/superstructure relation within the paradigm of "[b]ases need superstructures, and they get the superstructures they need because they need them."¹⁵⁴ He chooses Marx's explanations in *The Grundrisse* as the most illuminating one.¹⁵⁵ He views the Marxist

148. MARX, *supra* note 146.

149. *Id.* at 44.

150. *Id.* at 43.

151. *Id.* at 44. In fact, according to Cain and Hunt, Marx's most famous passages about the base/superstructure thesis — those from the 1859 *A Contribution to the Critique of Political Economy* — are those that gave rise to a misperception of reductionism. KARL MARX & FRIEDRICH ENGELS, MARX AND ENGELS ON LAW 48 (Maureen Cain & Alan Hunt eds., Academic Press 1979) [hereinafter MARX AND ENGELS ON LAW].

152. COHEN, *supra* note 60, at 214.

153. MARX AND ENGELS ON LAW, *supra* note 151.

154. COHEN, *supra* note 60, at 233.

155. *Id.* (quoting KARL MARX, THE GRUNDRISSE: "[E]very form of production creates its own legal relations, forms of government, etc. The crudity and the shortcomings of the bourgeois conception lie in the tendency to see but an accidental reflective connection in what constitutes an organic union.").

concepts of base/superstructure as being organically connected,¹⁵⁶ and his explanation seems rather persuasive.¹⁵⁷

Marx however did not limit his explanations about social change to a mechanical relation between base and superstructure. Meaningful social changes for Marx, such as the changes from one mode of production to another, were ultimately the result of class struggle.¹⁵⁸ For him changes occurred during the times of "social revolution."¹⁵⁹

It is easy to see why his explanation may lack mass appeal today, especially with elite law schools' faculty and student bodies. In our affluent capitalist society where it is easier to drown in middle-class distinctions rather than comprehend the whole spectrum of social class, Marx has been read as not taking into account the ever-expanding productive forces and their impact on the productive classes.¹⁶⁰ Similarly, Marx has been viewed as making only the case for the "nature of individuals [as being dependent] on the material conditions determining their production,"¹⁶¹ and ignoring the other elements that have proved important in determining the individuals' nature and actions, many of them being inculcated through the values promoted by pop(ular) culture¹⁶² that have (arguably) narcotized any efforts toward class consciousness.

Actually, Marx, as Hobsbawm noticed,¹⁶³ recognized the "necessary long-term historical tendencies of capitalist development," both in *The Communist Manifesto*, and in *Das Capital*¹⁶⁴ (in which Marx analyzed from

156. *Id.*

157. *Id.*

158. FREEMAN, *supra* note 80, at 958 ("History is conceptualized as a history of class struggles.").

159. MARX, *supra* note 146, at 44 (For Marx, as Lenin pointed out often times, such revolutions did not mean armed revolutions.). See also VLADIMIR LENIN & KARL MARX, *THE CIVIL WAR IN FRANCE: THE PARIS COMMUNE* 90 n.3 (2d ed., Int'l Publ'g 1988).

160. FREEMAN, *supra* note 80, at 958 n.39.

161. KARL MARX & FRIEDRICH ENGELS, *THE GERMAN IDEOLOGY* Chpt.1 (Progress 1968) (1932).

162. See Jeffrey Olick, *Popular Culture in THE ENCYCLOPEDIA OF AESTHETICS* 44 (Michael Kelly ed., 1998) (Popular culture is mass-produced (unlike folk culture) and is mass-consumed (unlike high culture)). Members of both the Frankfurt School and of Cultural Studies agree that popular culture inculcates the masses with a hegemonic ideology that promotes leisure values and narcotizes its recipients. *Id.* at 46. See also Michael H. Davis & Dana Neacșu, *Legitimacy, Globally: The Incoherence of Free Trade Practice, Global Economics and Their Governing Principles of Political Economy*, 69 U. MO. KANSAS CITY L. REV. 733, 739 (2001) (suggesting that public consensus to the existing social order is due in large part to a desire of the working classes to emulate the values of the leisure classes).

163. Eric Hobsbawm, *Introduction in KARL MARX & FREDERICK ENGELS, THE COMMUNIST MANIFESTO* 16 (2d ed. 1998) (1848).

164. KARL MARX, *CAPITAL: VOLUME I AN ANALYSIS OF CAPITALIST PRODUCTION* (1867), reprinted in *KARL MARX, CAPITAL AND OTHER WRITINGS OF KARL MARX* 11 (Max Eastman ed., 1932).

an economic perspective the capitalist mode of production). In his view, in capitalism, human relationships include an element of alienation due to the separation of the direct producers from the means of their own labor and reproduction.¹⁶⁵ Furthermore, Marx emphasized the "subjugation of man by his own works, which have assumed the guise of independent things,"¹⁶⁶ and thus intimated the difficulty of achieving a clear understanding of the reasons and the needs for social change.

Gramsci,¹⁶⁷ a century ago, Cain and Hunt¹⁶⁸ and Katznelson¹⁶⁹ *inter alia*, more recently, have stressed the interplay between capitalist economy, state, and civil society — as useful concepts of analysis, especially due to their complex differentiations in modern capitalist societies.¹⁷⁰ The outcomes of political struggles, writes Katznelson, "cannot be explained in terms of disappointment as against theoretically derived expectations."¹⁷¹ Instead, he suggests, each concrete outcome should be made "the object of explanation."¹⁷²

In another attempt to update Marx's analysis of social revolutions, G.A. Cohen explained that Marx viewed the historic role of social classes by virtue of the limited possible surplus.¹⁷³ And, as Cohen further underscored, history has validated Marx's position: capitalist accumulation is possible only at the expense of the majority, therefore capitalism naturally creates a rich minority and a less affluent majority.¹⁷⁴ Globalization has burnt down barriers, and helped the riches to accumulate in some few countries where the poor is not as destitute as those of Eastern Europe, Russia, South East Asia, or Latin America, where a majority of their populations live beyond the United States level of poverty.¹⁷⁵ Perhaps

165. *Id.*

166. LESZEK KOLAKWSKI, 1 MAIN CURRENTS OF MARXISM, THE FOUNDERS 178 (P.S. Falla trans., 1978).

167. See ANTONIO GRAMSCI, *supra* note 7; ANTONIO GRAMSCI, LETTERS FROM PRISON (1973); and ANTONIO GRAMSCI, SELECTIONS FROM POLITICAL WRITINGS, 1910-1920 (1977).

168. MARX AND ENGELS ON LAW, *supra* note 151, at 50-51.

169. KATZNELSON, *supra* note 79, at 63.

170. *Id.* at 69-70.

171. *Id.* at 71.

172. *Id.*

173. COHEN, *supra* note 60, at 211.

174. *Id.* at 214.

175. For example, in 2003 while Cambodia had a GDP per capita of \$1,900 (2003 estimate) with 36% of the population living beneath the poverty line (1997 estimate), and Romania had a GDP of \$7,000 (2003 estimate) with 44.5% of the population living beneath the poverty line (2000 figure), the United States had a GDP of \$37,800 (2003 estimate), and only less than 12% of the population living below the poverty line (2003 estimate). It is this author's understanding that each country designates its own level of poverty. CIA-THE WORLD FACTBOOK-CAMBODIA, at <http://www.cia.gov/cia/publications/factbook/geos/cb.html#Econ> (last visited Apr. 15, 2005); CIA-THE WORLD FACTBOOK-ROMANIA, at <http://www.cia.gov/cia/publications/factbook/geos/ro.html#Econ> (last visited Apr. 15,

this relativism makes it more difficult for the scholars from the few lucky countries to see the viability of Marx's concept.

Predictions are difficult to make. But it seems that we do live in a world that Marx aptly described as a continual transformation of capitalism. "The need of a constantly expanding market for its products chases the bourgeoisie over the whole surface of the globe. It must nestle everywhere, settle everywhere, establish connections everywhere."¹⁷⁶ We bear witness to an ever-expanding capitalism that is trying with all its might to conquer all existing markets for raw material (Iraqi oil¹⁷⁷) and cheap soldiers (Eastern Europe¹⁷⁸), in order to appease the ever-growing domestic gap between the leisure classes and the productive ones. The end of the cold war meant the incorporation of a new market, or at least the death of a competitor. Currently, we are the beneficiaries of a world market, where old-established industries have been destroyed or are daily being destroyed.¹⁷⁹ All this in the name of satisfying what Marx called, "new wants," that will keep the system going and which require "for their satisfaction the products of distant lands and climes [such as Iraqi oil]."¹⁸⁰

Marx did believe that capitalism contains its own rules of transformation epitomized by the conflict between the working class (the proletariat) and the capitalists.¹⁸¹ While Marx identified the working manufacturing class as being the revolutionary class, he also stressed its need to escape false consciousness. Opportunely, he did not give a recipe

2005); and CIA-THE WORLD FACTBOOK-THE UNITED STATES, at <http://www.cia.gov/cia/publications/factbook/geos/us.html#Econ> (last visited Apr. 15, 2005).

176. KARL MARX & FRIEDRICH ENGELS, MANIFESTO OF THE COMMUNIST PARTY, in MARX AND ENGELS: BASIC WRITINGS, *supra* note 127, at 10.

177. Sturminster Newton, *It's the Oil, Stupid*, 33 THE ECOLOGIST 11 (July/Aug. 2003). ("Paul Wolfowitz, the US deputy defense secretary has admitted that oil was the reason for invading Iraq during his speech in a Asian security summit in Singapore. His admission disproves the repeated claims of the US and UK governments that the war was not influenced by Iraq's oil reserves.")

178. Ian Fisher, *U.S. Eyes a Willing Romania As a New Comrade in Arms*, N.Y. TIMES, July 16, 2003, at A1

(Kurt Sanger is only a captain and so he will leave to higher-ups the question of whether Romania would make a good ally as the United States sets about a historic reordering of its military, relying less on its old friends in Western Europe and more on new ones in the east. He does, however, have some thoughts about Romania as a place where American soldiers like him may find a new home, perhaps soon. "Paradise isn't too strong a word," said Captain Sanger, 31, a Marine reservist on leave from his job as a lawyer in Manhattan. "It is cheap, he said, and the food is excellent.").

See also Robert D. Kaplan, *A New (Willing) Ally in Europe*, N.Y. TIMES, Nov. 10, 2002, at 4-14, and Ian Fisher Romania, *Woody by U.S., Looks to a Big NATO Role*, N.Y. TIMES, Oct. 23, 2002, at A3.

179. MARX & ENGELS, *supra* note 176, at 11.

180. *Id.*

181. MARX AND ENGELS ON LAW, *supra* note 151, at 46-47.

for how the working class would escape false consciousness and transform into revolutionary proletariat, as he did not anticipate the myriad of ways in which the values of the leisure classes would be spread to the middle and working classes.¹⁸²

Marx did not foresee the power of the media as a tool of maintaining false consciousness. He did not anticipate that the values of selfish individualism would be adopted by middle and lower classes whose members would have little or no empathy for the penniless ones.¹⁸³ Conversely, he did not foresee that in today's advanced capitalism, only the upper classes will share class-based ideology fomenting class solidarity on economic terms.¹⁸⁴

Moreover, due to the latest changes¹⁸⁵ in the structure of the productive classes and in light of the new and ever subtle role cultural hegemony plays in our current society, false consciousness seems to be staying with us for awhile; or at least until the productive forces of our society have reached their full potential. "No social order ever disappears before all the productive forces for which there is room in it have been developed, and new, higher relations of production never appear before the material conditions of their existence have matured in the womb of the old society."¹⁸⁶

Many scholars have actually tried to discard Marx's position on the role of the working class. Hobsbawm, for example, suggested that some of Marx's arguments may be discarded and his analysis of capitalism will still remain valid.¹⁸⁷ The idea that "the proletariat was a class which could not liberate itself without thereby liberating society as a whole first appears as a philosophical deduction rather than a product of observation."¹⁸⁸ Marx's vision of a liberating proletariat could thus be viewed according to Hobsbawm as "a hope read into [Marx's] analysis of capitalism, but not a conclusion necessarily imposed by that analysis."¹⁸⁹

But such an attempt is unnecessary. First, the apparent disarray of Marx's theory on the revolutionary role of the working class is due to the fact that the 19th century working class has been replaced, for all purposes, with the lower middle class, who still has a long way to go before realizing

182. See Davis & Neacșu, *supra* note 162.

183. See, e.g., Delphine Corteel & Judith Hayem, *End of Loyalty, End of Middle Class? A Critic of Globalization*, MANAGEMENT RESEARCH NEWS 41-43 (2000).

184. Chaplin, *supra* note 72.

185. Hobsbawm, *supra* note 163, at 19. (stating that until 1970 the industrial workers "formed a larger population of the total occupied proportion in the industrial and industrializing world," except for the United States, where the percentage of people employed in manufacturing industry started to decline earlier).

186. MARX, *supra* note 146, at 44.

187. Hobsbawm, *supra* note 163, at 23.

188. *Id.* at 22-23 (citations omitted).

189. *Id.* at 25.

that its middle-class taste cannot be satisfied with its working-class wages. As for today's poor, they are out of work and marginalized, and for all political purposes non-existent. Lacking proper education and membership in political organizations — such as unions — and moreover, lacking minimal economic independence, they are easily manipulable or ignored as they do not vote. Thus, Marx's view about the role of the proletariat should not be discarded yet, as this class seems to be in transition from the manufacturing working class to lower middle class. Or as Jon Elster encourages his readers, perhaps it is time to look into long-term relevant theories rather than short-term theoretical gratifications.¹⁹⁰

Without doubt, the Marxist social theory has contributed greatly to understanding human history.¹⁹¹ And its supporters think that it can continue being a relevant descriptive theory if it accepts to embrace complexity. Within the confines of urban sociology, for example, Katznelson explains "complexity" to mean the study of the degree of primacy of the economic base, and the definition of superstructure — as including the concrete "phenomena that lie outside the confines of capitalist accumulations."¹⁹²

History shows that the Marxist set of ideas remains valid even from a prescriptive perspective. Without an adequate economic component no social change can or has happened. For example, the fall of the former Soviet empire supports his thesis: "revolutions are not made by law."¹⁹³

It is common knowledge today that the soviet style "revolutions" (like those in Romania and the other Eastern European satellite countries) were unable to install socialism as a superior mode of production to the capitalist one, because those revolutions did not happen at the height of capitalism in those countries. Those "revolutions" did not benefit from a collectivized working class rescued from "parochialism of rural and craft idiocy,"¹⁹⁴ and they did not benefit from any "concentration of wealth under capitalism means"¹⁹⁵ that would have helped the collective appropriation of the means of production.

Those social developments were meant to be a substitute for centuries of material growth. They attempted to accelerate the socio-economic progress in those societies without having to wait for centuries to happen organically. They sought to cause that by legally changing the relations of production or the "property relations,"¹⁹⁶ which as Marx acknowledged, are

190. ELSTER, *supra* note 62, at 17.

191. KATZNELSON, *supra* note 79, at 308.

192. *Id.* (in "G.A. Cohen's demanding sense of the term.").

193. KARL MARX, CAPITAL: VOLUME 1 A CRITICAL ANALYSIS OF CAPITALIST PRODUCTION 88 (Lawrence and Wishart 1970) (1867).

194. *Id.* at 215.

195. *Id.*

196. MARX, *supra* note 146, at 43-44.

"but a legal expression for the same thing."¹⁹⁷ The Soviet-style "revolutions" sought to first improve the instruments of production, "and thereby the relations of production, and with them the whole relations of society."¹⁹⁸ They were indeed able to increase the urban population, and "rescue[] a considerable part of the population from the idiocy of rural life."¹⁹⁹ They were also able to nationalize the means of production and replace the myriad of landowners and other small capitalists with one (corporate) employer — the state.

Thus, those social transformations could not and did not address real conflicts between the material forces and the property relations to entail replacement of capitalism. No socialist movement was possible in that part of the world as those societies had only an incipient form of capitalism which, according to Marxist theory, did not have time to grow internal conflicts that necessitated its replacement.²⁰⁰ Moreover, in all the Eastern countries where those so-called revolutions happened, they were imposed from outside (by Soviet Russia). They did not grow within the previous system. Therefore, the domino effect caused by the bankruptcy of their bankroller, Russia, that brought them back to an incipient capitalism was all too expected.

Today, when the outside imposition ceased, as Nicholas D. Kristof recently pointed out, the former European Soviet countries are back in the year 1930, trying to finish up their capitalist mode of production elbowing for international investment with the other countries from their league — the Third World. "So someday [they] may even regain the level [they] enjoyed in the 1930's — and rise up from there."²⁰¹

Those examples clearly show that politics, law, even ideologies are not sufficient to implement social changes. The material forces of production in those countries were not ready for change. Additionally, the ideological component failed, as there one false consciousness supplanted another. People were duped and upon realizing it, they stopped supporting the regime.

197. *Id.*

198. MARX & ENGELS, *supra* note 176.

199. *Id.* at 11.

200. In *The Class Struggles in France, 1848-1850*, Marx explained that:

The development of the industrial proletariat is, in general, conditioned by the development of the industrial bourgeoisie. Only under its rule the proletariat wins the extensive national existence, which can raise its revolution to a national one and itself creates the modern means of production, which become just to many means of its revolutionary emancipation. Only bourgeois rule tears up the roots of feudal society and levels the ground on which a proletarian revolution is alone possible.

KARL MARX, *THE CLASS STRUGGLES IN FRANCE, 1848-1850* 43 (Int'l Publishers 1964) (1850).

201. Nicholas D. Kristof, *Soviet Shadows, Ukrainian Ghosts*, N.Y. TIMES, Aug. 26, 2003, at A19.

Thus, those failed revolutions prove in fact that social change needs both elements to be ready for change: the economic and the non-economic component. Therefore, we still do not know whether superstructure — including all its non-economic components — may be only a catalyst, or even the other necessary element, and the economy is the main element or perhaps the other necessary element of the social change reaction.²⁰² And this lack of conclusion does not contradict Marx who took into consideration only the hypothesis of the ready-for-change economic basis.²⁰³

Of course, it should be absurd to regard Marx's writings as if they were the Bible. Marx probably would have had a good laugh thinking that his theory would be held in low esteem for not speaking God's word.²⁰⁴

However, such a failure does not weaken the argument that his writings offer a unique framework for interpreting social realities which needs to be part of our liberal intellectual vocabulary. Furthermore, its socio-economic emphasis and the interests it echoes, its views about the role of superstructure and especially about ideology are still relevant to any attempt at demystifying the legal system.²⁰⁵

V. MARX'S VIEW ABOUT LAW AND IDEOLOGY

Another useful concept in the study of law is Marx's concept of "ideology." Jon Elster explains Marx's position about ideologies, and translates the term to cover both beliefs and values, and to represent the "non-coercive equivalent of the political."²⁰⁶

202. Davis & Neacșu, *supra* note 162, at 736.

203. At times Engels tried to explain certain apparent inconsistencies in his friend's writings. In one such example he stated: "Marx and I are ourselves partly to blame for the fact that the younger people sometimes lay more stress on the economic side than is due to it. We had to emphasize the main principle vis-à-vis our adversaries, who denied it." ENGELS, LETTER TO BLOCH 21.9.1890, in MARX AND ENGELS ON LAW, *supra* note 151, at 50 n.5.

204. In *Karl Marx, A Life*, a book whose table of contents reads more like a zoo's list of occupants than the chapters in the life of the "Red Terrorist Doctor," Francis Wheen brought evidence about Marx's geniality, affable spirit and dry humor that quickly became apparent even to strangers upon brief encounters. See, e.g., the chapter entitled "The Shaven Porcupine," where Wheen narrates Marx's brief encounter with an English lord, and the impression Marx made on his host. FRANCIS WHEEN, *KARL MARX, A LIFE* 360-61 (First Am. ed., W.W. Norton & Co., Inc. 2000) (1999).

205. The American legal academia has known theories of thought that underlined the ideological role of the law, but as I showed elsewhere, it purged itself of that past sin, very much like a witness during the McCarthy era purging himself of his communist past. See, e.g., Neacșu, *supra* note 8, at 416 (2000) (The metaphor used there was much tamer, and it referred to a cartoon and one of his iconoclastic characters.).

206. ELSTER, *supra* note 3, at 462.

For Marx ideologies help justify class interests,²⁰⁷ and law legitimizes them. In the following excerpt from *Result of the Immediate Process of Production*, Marx identifies ideologies as being beliefs: they are products of the "[man's] own brain."²⁰⁸ He also views them as religion, and as religion, he considers them false. Furthermore, as religion, he considers them false. "At the level of material production, of the life-process in the realm of the social — for that is what the process of production is — we find the *same* situation that we find in religion at the *ideological* level, namely the inversion of subject into object and *vice versa*."²⁰⁹

A dominant ideology is constituted "by a relatively coherent set of 'discourse' values, representations and beliefs,"²¹⁰ that "so reflect the experiential relations of individual subjects to their social conditions as to guarantee those misperceptions of the 'real' which contribute to the reproduction of the dominant social relations."²¹¹ Marx, as Cain and Hunt emphasize, argued that "law provides the greatcoat of a transaction already well swaddled in mystification: legal transactions reinforce the false appearance of economic transactions."²¹²

In an affluent society like ours, of course ideology covers more than economic interests, as law covers a multitude of interests, not only those of the dominant class. However, as Sumner pointed out, the legal system does not express those interests in an equally pluralistic way.²¹³ To the contrary, law covers them according to the ideologies of the dominant classes ("to the propertied, the powerful and the highly educated"),²¹⁴ and legitimizes them in the eye of the others. "[The legal system] is the weapon and toy of the hegemonic bloc of classes and class fractions whose rough consensus it sustains. As such, it lies hidden beneath a shroud of discourse, ritual and magic which proclaim the Wisdom and Justice of The Law."²¹⁵

207. MARX & ENGELS, *supra* note 161, at 60-62. See also MARX AND ENGELS ON LAW, *supra* note 151, at 57-58.

208. MARX, *supra* note 164, at 621, quoted in ELSTER, *supra* note 3, at 479.

209. ELSTER, *supra* note 3, at 480 (quoting KARL MARX, RESULTS OF THE IMMEDIATE PROCESS OF PRODUCTION).

210. EAGLETON, *supra* note 139, at 54.

211. *Id.*

212. MARX AND ENGELS ON LAW, *supra* note 151, at 109.

213. COLIN SUMNER, READING IDEOLOGIES: AN INVESTIGATION INTO THE MARXIST THEORY OF IDEOLOGY AND LAW 277 (Academic Press 1979).

214. *Id.*

215. *Id.*

Marx's view about law was succinct.²¹⁶ Its lack of thorough articulation led to various criticisms. However, his theory helped demystify legal relations — as a type of social relations — that appear in the process of law creation and its application. Like all social relations, they have an economic component, or, as Marx said “neither legal relations nor political forms could be comprehended whether by themselves or on the basis of a so-called general development of the human mind, but that on the contrary they originate in the material conditions of life, the totality of which Hegel . . . embraces within the term ‘civil society.’”²¹⁷

Marx's acknowledgment that juridical relations reflect economic relations²¹⁸ has become a point of contention.²¹⁹ He remained accused of bluntness and of not taking into consideration that that reflection is ingrained in local traditions, and it comes in a multitude of shades that translate into a multitude of variations of the capitalist legal system.²²⁰ Thus, finding common features in the myriad of capitalist legal systems remains a daunting process that is hardly ever attempted. For example, even the law's role in stabilizing relations of distribution by establishing the rules of taxation needs to be gauged in each specific instance.²²¹

In *The German Ideology*, both Marx and Engels further explained how law legitimizes class interests. The state becomes the intermediary between class interests and law. As a result law appears to be autonomous and thus free of class interests.

Since the state is the form in which the individuals of a ruling class assert their common interests, and in which the whole civil society of an epoch is epitomized, it follows that all common institutions are set up with the help of the state and are given political form. Hence the illusion that law is based on the will,

216. To the contrary, Engels acknowledged that the basis of the right of inheritance was an economic one, and that it influenced “the distribution of property,” thus having a “considerable effect on the economic sphere.” Letter from Friedrich Engels to Conrad Schmidt (Sept. 21, 1890), reprinted in MARX AND ENGELS ON LAW, *supra* note 151, at 57-58. In *Ludwig Feuerbach*, Engels further expounded on the law's perceived autonomy: because law emanated from the state, it appeared removed from any concrete individual interests. LUDWIG FEUERBACH, in MARX AND ENGELS ON LAW, *supra* note 151.

217. KARL MARX, *Preface to A CONTRIBUTION TO THE CRITIQUE OF POLITICAL ECONOMY*, reprinted in KARL MARX, *SELECTED WORKS* 210-211 (Lawrence H. Simon ed., Hackett Publ'g Co. 1994).

218. “The relations of production are roughly what in non-Marxist language is called property rights, with a few nuances. They include only property of productive forces, [which can be viewed as ‘everything that promotes the mastery of man over nature, for the purpose of want satisfaction’]” ELSTER, *supra* note 3, at 106.

219. FREEMAN, *supra* note 80, at 959.

220. *Id.* at 960.

221. *Id.*

and indeed on the will divorced from its real basis — on *free* will.²²²

It is true that unlike conventional theories that emphasize the separation of powers,²²³ Marxism highlights the relationship between “law and the state apparatus of class society.”²²⁴ Although there is no clear Marxist theory of state (at there is no clear Marxist theory of law, either²²⁵), it should be noted that, according to Cain and Hunt, there is at least one persistent theme that emerges in Marxist writings regarding the role of the state: through law the state gives the class interests it protects a universal form.²²⁶ They use as an example on point legal rights.

The authors point out that legal rights belong to citizens who are devoid of ranks, and are “formally equal.”²²⁷ The law protects the property of all, and thus “obliterates or obscures the real relations between social classes.”²²⁸ Thus, “personal rules [assume] the form of average [neutral] rules.”²²⁹

Marxism promotes demystifying legal institutions, and outing hidden agendas that lie behind legal rules. Such an attempt is praiseworthy because, as Marx and Engels acknowledged, due to the relative autonomy of law, it becomes easy for jurists, especially law students or young graduates, to believe their “craft to be the true one,”²³⁰ and assume “an independent existence.”²³¹ It becomes easy to forget to look behind legal concepts. “The judge, for example, applies the code, he therefore regards legislation as the real, active driving force.”²³² But lawyers don’t have to remain the “dupes of their own tortuous and reified thought process.”²³³ As

222. KARL MARX, *THE GERMAN IDEOLOGY*, reprinted in *MARX AND ENGELS ON LAW*, *supra* note 151, at 53.

223. See James Madison, *XLVII. The Meaning of the Maxim, which Requires a Separation of the Departments of Power, Examined and Ascertained*, in *THE FEDERALIST PAPERS*, at 302 (Isaac Kramnick 1987) (“I proceed to examine the particular structure of this government, and the distribution of this mass of power among its constituent parts.”); and James Madison, *XLVIII. The Same Subject Continued with a View to the Means of Giving Efficacy in Practice to that Maxim*, in *THE FEDERALIST*, *supra*, at 308.

224. *MARX AND ENGELS ON LAW*, *supra* note 151, at 144.

225. *Id.* at 145-46.

226. *Id.* at 148.

227. *Id.*

228. *Id.*

229. *MARX*, *supra* note 222, at 153.

230. *Id.* at 54.

231. *Id.*

232. *Id.*

233. FRIEDRICH ENGELS, *ANTI-DUHRING* 404 (Progress Publishers 1947) (1878)

(And not only the labourers, but also the classes directly or indirectly exploiting the labourers are made subject, through the division of labour, to the tool of their function: the empty-minded bourgeois to his own capital and his own insane craving for profits; the lawyer to his fossilized legal conceptions, which dominate

Justice Blackmun's struggle though his entire career with the death penalty shows, jurists have a duty to inquire into the roles of legal rules and to help abolish them when their application becomes perverse.²³⁴ Or, they may become "disaffected 'bourgeois doctrinaires,'"²³⁵ and influence a more inclusive law school curriculum.

CONCLUSION

This article noticed that elite (law) schools produce the knowledge that mostly influences our public discourse. It also noticed that at the undergraduate level, and more so at the graduate — law — level, elite schools' curricula mostly ignore Marxism. Accordingly, it advocates for more inclusive curricula that would translate John Stuart Mill's "market of ideas" into a diverse choices of courses to include some that would require Marx's writings as well.

As shown above, Marxism cannot be easily dismissed as epistemologically irrelevant. Unlike more popular identity theories,²³⁶ Marxism focuses on our socio-economic identity,²³⁷ which remains relevant, both at the domestic and international level. While perhaps there are other more nuanced theories which identify other social wounds, Marxism remains a major intellectual player because people distinguish themselves socio-economically irrespective of borders, races, genders and

him as an independent power; the "educated classes" in general to their manifold species of local narrow-mindedness and one-sidedness, to their own physical and mental short-sightedness, to their stunted growth due to their narrow specialized education and their being chained for life to this specialized activity — even when this specialized activity is merely to do nothing.).

234. See, e.g., Linda Greenhouse, *Documents Reveal the Evolution of a Justice*, N.Y. TIMES, Mar. 4, 2004, at A1.

235. *Id.*

236. It has already been remarked on the proliferation of identity theories, usually offsprings of CLS, and the fall of classical Marxism into oblivion. It has also been remarked on the coincidence between the offsprings taking front stage and the dismissal of all Marxist discourse. See, e.g., Neacșu, *supra* note 8, at n.57. Scholars have also stressed that if all the left has to offer currently are identity theories, at the expense of Marxism (or other theories of redistribution), that would be a "seriously regressive development." See, e.g., RONALD DWORKIN, *LAW'S EMPIRE* 297 (Belknap Press of Harvard Univ. Press 1986) (describing and comparing different conceptions of equality within the common law tradition, such as libertarian, welfare and material-equality theories); EDGEWORTH, *supra* note 27, at 261; NANCY FRASER, *JUSTICE INTERRUPTUS: CRITICAL REFLECTIONS ON THE "POSTSOCIALIST" CONDITION* (Routledge & Kegan Paul 1997).

237. It is not the purpose of this article to denigrate other identity theories and the interests they promote as being easily derailed by the establishment discourse. See, e.g., Neil A. Lewis, *Stymied by Democrats in Senate Bush Court Pick Finally Gives Up*, N.Y. TIMES, Sept. 5, 2003, at A1 (Even Tom Delay of Texas, the House majority leader, made a major contribution to the Hate Crimes Public Discourse. He attacked the proponents of Hate Crime Legislations, the Democrats, in response to Miguel Estrada's withdrawing his candidacy for a federal judgeship. Tom DeLay said that "Estrada was the victim of a political Hate crime.") (citations omitted).

creeds. Most of their life-defining choices are, and will always be, governed by our economic circumstances and by legal norms that reflect those circumstances.